

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER**

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UNITED STATES OF AMERICA,)	
Complainant,)	8 U.S.C. § 1324a Proceeding
)	
v.)	OCAHO Case No. 97A00148
)	
WESTHEIMER WASH CORPORATION)	Judge Robert L. Barton, Jr.
D/B/A BUBBLES CAR WASH,)	
Respondent.)	
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**ORDER DENYING COMPLAINANT'S MOTION TO
STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES**

(December 4, 1997)

Complainant has moved to strike three affirmative defenses in Respondent's First Amended Answer to the Complaint. Respondent has not filed any response to the Motion.¹

The three affirmative defenses which Complainant seeks to strike are as follows: (1) Respondent's contention that the complaint does not identify the names and addresses of respondent's agents and/or representatives who allegedly committed the violations; (2) Respondent's substantial compliance defense; and (3) Respondent's asserted inability to pay the civil money penalty requested in the complaint.

At the outset I would note that Respondent's answer only designates one defense as an affirmative defense, namely Respondent asserts that it is a small business and that the payment of the fines sought by the INS would seriously impair the financial viability of the Respondent and threaten its ability to continue in business. Complainant asserts in its Motion that Respondent has failed to provide any facts which demonstrate its current financial condition or its business size, and therefore its factual assertions are insufficient to support its defense and such defense should be stricken. However, Complainant misunderstands what is required in setting forth an affirmative

¹ Complainant's Motion was served on Respondent by certified mail on November 12, 1997. Therefore, since the OCAHO Rules of Practice require that a response to a motion served by mail must be filed within fifteen days, 28 C.F.R. §§ 68.8(b)(2) and 68.11(b), Respondent's response to the motion was due by November 28, 1997. To date no response has been received.

defense. The Rules require a statement of facts supporting each affirmative defense, 28 C.F.R. § 68.9(c)(2), but such statement does not need to be exhaustive or compelling. Although Respondent bears the burden of proving inability to pay, it certainly does not have to present its proof in the answer to the complaint. Moreover, Complainant may use the discovery tools available in the OCAHO Rules of Practice to determine the basis for Respondent's inability to pay assertion. I find that Respondent has adequately complied with 28 C.F.R. § 68.9(c)(2), and therefore Complainant's motion to strike this defense is denied.

With respect to the other two purported affirmative defenses, I find that these have not been set forth as affirmative defenses. Although Respondent asserts that the allegations do not identify the names and addresses of agents or representatives who have been alleged to have committed the violations as required by 28 C.F.R. § 68.7(b)(2), Respondent's assertion is not set forth as an affirmative defense, and Respondent has not moved to dismiss the complaint or even require a more definite statement. Respondent's assertion merely is made as part of its answer to the complaint, and there is no basis for striking that assertion.

Finally, Complainant seeks to strike Respondent's assertion that the paperwork violations were de minimis and that Respondent was in substantial compliance with the law. Complainant has cited the relevant case law on substantial compliance, such as United States v. Corporate Loss Prevention Associates, 6 OCAHO 908 (1997); United States v. Mark Carter, 6 OCAHO 865 (1996); United States v. Mesabi Bituminous, 5 OCAHO 801 (1995); and United States v. Northern Michigan Fruit Co., 4 OCAHO 667 (1994). However, Respondent has not posited its assertion in an affirmative defense and has not filed any motion seeking a finding that it substantially complied with the law. If Respondent seeks to rely on a substantial compliance defense, it bears the burden of proof with respect to such a defense. In any event, the issue is not ripe for adjudication at this time. Complainant's motion to strike is therefore premature.

For the reasons expressed above, Complainant's motion is denied.²

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

² Although I have denied Complainant's motion without any input from Respondent, Respondent is warned that in the future if it fails to respond to a motion filed by Complainant, I may find that the motion, being unopposed, should be granted. Since Respondent is represented by counsel, I expect that counsel should be diligent in responding to motions from the opposing party.

I hereby certify that on this 4th day of December, 1997, I have served the foregoing Order Denying Complainant's Motion to Strike Affirmative Defenses on the following persons at the addresses shown, by first class mail, unless otherwise noted:

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